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No. 84-1538 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, *et al.*,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CALIFORNIA ASSOCIATION OF REALTORS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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Pursuant to Rule 36 of the Rules of the Court, amicus hereby seeks leave to file the attached brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al.

Amicus California Association of Realtors (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors and those persons licensed as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors and over 100,000 members. The issues affecting the power of local government to regulate competition in the real estate market are of vital importance to amicus and the industry it represents. This case presents the

important issue of whether municipalities can fix the price of rents chargeable by private landowners for rental housing in the absence of a clearly articulated and expressed state policy to displace price competition with municipal regulation. The issues are compounded by the lower court's significant departure from the precedent firmly established by this Court in earlier case law. If the lower court's decision is allowed to stand, municipalities may have "carte blanche" to regulate any aspect of the economy in the name of health, safety, and welfare, regardless of the effect on overriding state and national free-market goals. Because of the *stare decisis* effect on all lower courts if this case is summarily dismissed, amicus strongly urges this Court to grant plenary consideration of the issues and overturn the test established by the court below. Consequently, we strongly feel the need to file a brief at the jurisdictional phase in spite of the disfavor alluded to in Rule 36.1. For these reasons, amicus is deeply concerned over the outcome of this case, and submits this brief to assist the Court in its consideration of the matter.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the California Association of Realtors respectfully submits this brief amicus curiae in support of Plaintiffs and Appellants, Alexandra Fisher, et al. A motion pursuant to 36.1 has been attached requesting leave to file this brief in the absence of consent of the respondent.

Amicus curiae California Association of Realtors (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state

trade association in the United States and has over 180 affiliated Boards of Realtors and over 100,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses sucessfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of real property rights.

Our interest in this case lies with the fact that the opinion of the California Supreme Court undermines the preservation of real property rights and creates new rules of law with far-reaching significance to the real estate industry engaged in the development and/or rental of real property. The California test would allow municipalities to promote their own purely parochial interests at the expense of the more overriding state and national goals.

Counsel for C.A.R. is familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by the amicus brief will be helpful to this Court.

INTRODUCTION

This Court clearly has established in several recent decisions that a municipality is subject to the federal antitrust laws unless it is acting pursuant to "clearly articulated and affirmatively expressed" "state policy to displace competition with regulation or monopoly public service." This approach has been found desirable because a state still can administer regulatory policies free of the inhibitions of federal antitrust laws without at the same time permitting parochial interests to disrupt the Nation's free-market goals.

On its face, the rent control ordinance conflicts with the policies and purposes of the Sherman Act. Under the ordinance, the city of Berkeley fixes the rent chargeable by private landlords of rental housing. The ordinance expressly con-

templates price-fixing, an activity long held as *per se* invalid under the Sherman Act. Moreover, the fact that Berkeley is setting a ceiling rather than a floor on rents is of no consequence; maximum price-fixing is as deleterious to competition as minimum price-fixing. This type of price-fixing creates the potential power to eliminate competition in the rental housing market, displaces supply and demand, and deprives landlords of their independent judgment in the determination of prices for rental housing. Rent control is an unreasonable and unlawful restraint of trade and, as such, is *per se* invalid, without the necessity of minute inquiry. It clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and therefore, the ordinance should be preempted by the Sherman Act under the Supremacy Clause of the United States Constitution.

Although states are free to regulate competition without being subjected to the inhibitions of federal antitrust law, municipalities are not accorded the same "state action immunity" because they are not themselves sovereign. Municipalities are not beyond the congressionally intended scope of federal antitrust laws unless they are acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with municipal regulation. In this context, the California Supreme Court has acknowledged "the conceded absence of any state statute authorizing local legislation on the subject." *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 140 (1976). California has not enacted a state rent control statute and the requirement of state action is not satisfied when the State's position is one of mere neutrality respecting the municipal action challenged as anticompetitive. Therefore, the rent control ordinance enacted by the city of Berkeley is not saved from Sherman preemption under the doctrine of *Parker v. Brown,* 317 U.S. 341 (1943).

In this case, moreover, the nexus between the rent control ordinance and interstate commerce is sufficient to invoke federal jurisdiction under the Sherman Act. Rent control causes serious economic dislocation, including retardation in the volume of rental housing sales and production. Consequently, the demand for financing and title insurance is severely impaired, a

large portion of which is supplied by multistate lending institutions and interstate title insurance corporations. Investors overwhelmingly agree that rent control has created a significant disincentive for investment in rental housing. Even those investors who desire to purchase rental housing are unable to do so because lending institutions are reluctant to supply the financing. This has led to a huge reduction in the price and volume of sales transactions of rental housing. Clearly, every commercial industry remotely connected with rental housing has felt the impact of these municipal rent control ordinances.

In *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980), this Court found a similar interstate effect sufficient to satisfy the Sherman jurisdictional requirements. *Id.*, at 242. Therefore, because the rent control ordinance, as a matter of practical economics, has a not insubstantial effect upon interstate commerce, the finding of federal jurisdiction should not stand as an obstacle to the proper resolution of this case on the merits.

Finally, amicus curiae California Association of Realtors urges this Court to consider this case on the merits because of the threat posed by the test created below by the California Supreme Court. This modified commerce clause test, established to determine the applicability of the Sherman Act to anticompetitive municipal regulation, significantly departs from the precedent established by this Court in recent decisions. As enunciated by the court below, it threatens the continued economic stability of this state, giving municipalities the power to override, in the name of health, safety, and welfare, more important state and national free-market goals. Unfortunately, this threat will be devastating if this California test is given *stare decisis* effect upon all lower courts through a summary dismissal by this Court. *See Hicks v. Miranda,* 422 U.S. 332 (1975). Because of the aforementioned considerations, we respectfully urge this Court to give plenary consideration to this very important case.

ARGUMENT

THE RENT CONTROL ORDINANCE ENACTED BY THE CITY OF BERKELEY OBSTRUCTS THE SHERMAN ACT AND IS PREEMPTED UNDER THE SUPREMACY CLAUSE

A. Federal Law Requires that Local Governmental Bodies be Subjected to and Controlled by the Sherman Act.

State and local governments alike face constitutional restrictions upon the exercise of their police power because of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. The plenary power of Congress to regulate commerce imposes a preemptive limitation upon the exercise of local police power. The most expansive exercise of Congress' power under the Commerce Clause to date is the Sherman Antitrust Act, 15 U.S.C. Sec. 1, et seq. This Court has emphasized the importance of the federal procompetitive policy, stating:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) . . . . [*California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97, 110-111 (1980).]

The Sherman Act is one of the most comprehensive of all federal statutes. This Court has noted that the statute itself

> "shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." [*United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944).]

Congress deliberately used broad language in drafting the Sherman Act in an attempt to "establish a regime of competition as the fundamental principal governing commerce in this country." *City of Lafayette v. Louisiana Power and Light Company,* 435 U.S. 389, 398 (1978). In *Lafayette,* this Court concluded that, in light of the "potential of serious distortion" to the regime of competition, local governments could not be permitted to override the national policy favoring free competition. *Lafayette,* 435 U.S. at 408. The fact that anticompetitive local policies might be subject to correction through the political process was explicitly held insufficient to justify conferring a blanket exemption on local government:

> In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise "whatever economic muscle it can muster" [citation] without regard to the amount of influence it might have with local or state legislatures. [*Lafayette,* 435 U.S. at 406-407 (footnote omitted).]

In *Town of Hallie v. City of Eau Claire,* 53 L.W. 4418 (1985), this Court recently concluded that municipalities are "not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Id.,* at 4419. To obtain exemption from the federal antitrust policies, "municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service'" *Id.,* at 4419 (quoting *Lafayette,* 435 U.S. 389, 412). Municipalities, therefore, in the exercise of their local policy powers, may not seek to further purely parochial interests at the expense of more overriding state and national free-market goals. *See Town of Hallie,* 53 L.W. at 4422. Any municipal ordinance authorizing such anticompetitive conduct, in the absence of clearly articulated state policy, should be preempted by Sherman under the Supremacy Clause.

B. Sherman Act Preemption of Municipal Ordinances Under the Supremacy Clause.

A municipal ordinance is preempted by federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Price-fixing schemes are traditional and vulnerable targets of antitrust scrutiny. These schemes displace supply and demand and the judgment of independent traders in the determination of prices in the marketplace. Rent control definitionally restrains the setting of competitive pricing in a free market. It constitutes price-fixing, first and foremost among the *"per se"* violations of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). The fact that the City of Berkeley is setting a ceiling rather than a floor on rents chargeable by private landowners is of no consequence; maximum price-fixing is a per se violation of the Act. *Albrecht v. The Herald Company,* 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951).

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), this Court found that a state statute, which required members of the California wine industry to file fair trade contracts or price schedules with the state, facially conflicted with the Sherman Act because it mandated resale price maintenance, an activity that has traditionally constituted a *per se* violation of federal antitrust law. *Id.,* at 102-103. Clearly, a municipal ordinance that mandates price-fixing of multifamily residential rents, which is *per se* invalid under the Act, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines v. Davidowitz,* 312 U.S. at 67.

This Court has repeatedly stated that these policies are the preservation of free enterprise and open competition. *See, e.g., United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110-111 (1980). The power to

fix prices constitutes a serious threat to that procompetitive policy:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices .... *Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry* .... [*United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (Emphasis in original).]

By prohibiting upward price competition, rent control has the direct effect of "elimination of one form of competition." *United States v. Trenton Potteries Co.*, 273 U.S. at 397 (1927). Consequently, the carefully considered economic objectives of Congress are frustrated by local ordinances enacted to further purely parochial interests of the municipality. In the absence of municipal activity pursuant to clearly articulated and expressed state policy to displace competition with municipal regulation, the reasonableness of these rent controls is of no significance. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court foreclosed any inquiry into the wisdom of protecting competition in the marketplace:

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended. [*U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).]
>
> * * *
>
> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [*Id.*, at 226 n.59.]

The price-fixing ordinance enacted by the City of Berkeley, in the abstract, creates the "potential power" to eliminate competition in the rental housing market. It constitutes an "unreasonable and unlawful" restraint of competition and, as such, is a *per se* violation of federal antitrust law, "without the necessity of minute inquiry." *See Trenton Potteries*, 273 U.S. at 397. Therefore, because the rent control ordinance facially conflicts with federal antitrust policy under the Sherman Act, it is preempted by the Sherman Act under the Supremacy Clause.

C. The Rent Control Ordinance has a Not Insubstantial Effect Upon Interstate Commerce.

The broad authority of Congress to regulate under the Commerce Clause has been interpreted to extend beyond activities that are "in commerce" to include wholly intrastate activities that have a substantial "effect on commerce." *McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980).

The Court in *McLain* stated:

> This Court has often noted the correspondingly broad reach of the Sherman Act .... (Citations omitted.)
>
> * * *
>
> It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory .... (Citations omitted.) [*Id.*, at 241-242.]

Phillip Areeda, interpreting the *McLain* decision, stated:

> [T]he court [elsewhere] made clear that there must be a nexus, at least "as a matter of practical economics" between the challenged conduct and interstate

> commerce. Thus, *McLain* seems to mean that although the plaintiff need not make a "particularized showing" of an actual interstate effect caused by the challenged conduct, he must show that it would inherently tend, as a matter of practical economics, to have an interstate effect. [P. Areeda, *Antitrust Law,* paragraph 232-1c (Supp. 1982).]

Federal jurisdiction under the Sherman Act may be established by a showing that the allegedly anticompetitive conduct contemplated by the municipal rent control ordinance has, "as a matter of practical economics," a not insubstantial effect on the interstate commerce involved. *McLain,* 444 U.S. at 246.

McLain involved a situation in which the real estate brokers in the New Orleans area allegedly agreed to fix brokerage commissions through uniform rates, engaged in fee-splitting and suppressed market information useful to buyers and sellers of real estate. This Court found federal jurisdiction based upon the effect of the alleged brokerage activities on interstate commerce. *Id.,* at 242. In finding a nexus between the brokerage activity and interstate commerce, the Court noted the following:

> It is clear that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property. The presidents of two of the many lending institutions in the area stated in their deposition testimony that those institutions committed hundreds of millions of dollars to residential financing during the period covered by the complaint. The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by interstate corporations. [*Id.,* at 245.]

As a matter of practical economics, a not insubstantial effect upon interstate commerce clearly can be established in this case based upon the nexus between the rent control ordinance enacted by the city of Berkeley and the flow of goods and services in interstate commerce. In this case, the interstate commerce effect when a municipality imposes an artificial ceiling on rents charged by private landowners is even greater than that interstate impact which was held sufficient to invoke federal jurisdiction in *McLain.* Justice Lucas correctly noted in his dissent below that "[e]conomists are virtually unanimous in their condemnation of rent control laws." Opinion below, 37 Cal.3d 644, 715-716 (1984), *citing, e.g.,* Baird, *Rent Control: the Perennial Folly* at 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edition 1975) [essays by nine economists]; Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 691, 698 (1983). He points out that most economists take the view that rent control schemes cause what the Supreme Court has called "serious economic dislocation." Opinion below, 37 Cal.3d at 716, *citing Lafayette,* 435 U.S. at 412-413. He quotes, as example, the following observation made by Professors Milton Friedman and George Stigler:

> Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, *retardation of new construction* and indefinite continuance of rent ceilings, or subsidation of new construction and a future depression in residential building. [Opinion below, 37 Cal.3d at 716 (Lucas, J., dissenting) (*citing* Friedman and Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* p. 100 (The Fraser Institute edition (1975)).]

Most economists and commentators agree that maximum rent ceilings have a negative impact on the production of new rental housing. *See, e.g.,* Hirsch, *From "Food for Thought" to*

"Empirical Evidence" About Consequences of Landlord-Tenant Laws, 69 Cornell L.Rev. 604, 609-610 (1984) (concluding that in the long run, rent control will have a chilling effect on investors, curtailing the supply of housing); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721, 723 (1983) (asserting that the most harmful economic effect of rent control is manifested by its impact on housing production).

In discussing the effect of brokerage activities on the frequency and terms of residential sales transactions, the *McLain* court stated that "whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance." *McLain*, 444 U.S. at 246. These two commercial activities were shown in *McLain* to have occurred in interstate commerce. *Id.*

A retardation in the production of new rental housing, caused by the rent control ordinance, directly affects the demand for financing and title insurance. Just as in *McLain*, funds for financing the production of new rental housing in Berkeley are raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions take mortgages insured under federal programs which necessitate the interstate transfer of premiums and settlements. Moreover, mortgage obligations are physically and constructively traded as financial instruments in the interstate secondary mortgage market. In addition, lending institutions in California usually require title insurance before making a mortgage loan. This title insurance is often furnished by interstate corporations.

The California Association of Realtors (C.A.R.) is especially aware of the substantial impact that rent control has on investment in multifamily residential housing units. A publication by the Bay Area Council of San Francisco entitled, *Rental Housing in California: Obstacles and Opportunities* (April 6, 1983) revealed the following:

> The summary of results stated, "rent control is a major barrier to investment in rental housing development projects in California—even in communities without rent control ordinances."

> Of the mortgage lenders surveyed, 82% agreed that "rent control is a threat to any new multifamily project in California, no matter where it is located . . ." (See *Id.*, Appendix H, A-147-148, below.)

The report continued by stating that rent control was by far the most frequently named disincentive for multifamily lending in California. Clearly, rent control "affects the demand for financing and title insurance" both in and out of the State of California. *See McLain*, 444 U.S. 246.

To state that the investment rate of return is significantly less on residential rental property subject to artificially-imposed rent controls than on the same property unencumbered by anticompetitive municipal regulation is to state the very obvious. The Bay Area Council report is not unique to that particular area. Realtors throughout California and elsewhere have been severely impaired by rent control ordinances, similar to Berkeley's Measure D. In fact, repercussions are even felt in real estate market yet unaffected by rent control. Investors are generally unwilling to invest capital into traditionally risky real estate ventures, such as multifamily rental housing, upon which unreasonably low ceilings have been imposed. As was pointed out in the Bay Area Council report, even investors who desired to purchase rental housing may be unable to do so since mortgage lenders are unwilling to risk financing rental housing development projects in California.

This reluctance to invest in rental housing in California leads to a decrease in rental housing construction and a significant drop in the value of existing units. Buyers are unwilling to buy and sellers are unable to sell. Unfortunately, all of this serious economic dislocation is caused by municipalities seeking to further their own parochial interest at the expense of more significant, overriding state and federal free-market goals.

The economic impact of Berkeley's rent control on interstate commerce is widespread. In sum, "as a matter of practical economics," the rent control ordinance enacted by the city of Berkeley has an effect upon interstate commerce that is not insubstantial; therefore, federal jurisdiction under the Sherman Act may be firmly established.

II

THE TEST CREATED BY THE CALIFORNIA SUPREME COURT DEPARTS FROM PRECEDENT FIRMLY ESTABLISHED BY THIS COURT

In *Lafayette,* this Court rejected the argument that deference to local government policy compelled the finding of an implied exclusion from antitrust prohibitions for "actions of municipalities that exist to serve the public weal, . . ." 435 U.S. at 403. Writing for the Court, Justice Brennan stated:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.
>
> We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. [*Lafayette,* 435 U.S. at 408 (footnote omitted).]

In three recently decided municipal antitrust cases, *Lafayette, Boulder,* and *Town of Hallie,* this Court has clearly stated that anticompetitive activity engaged in by municipalities is shielded from antitrust scrutiny only in situations in which the action is taken "pursuant to state policy to displace service," *Lafayette,* 435 U.S. at 413, which is both "clearly articulated and affirmatively expressed." *Boulder,* 455 U.S. at 545; *see also Town of Hallie,* 53, L.W. at 4419-4420. This Court reiterated in *Town of Hallie* that "[m]unicipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie,* 53 L.W. at 4419.

The California Supreme Court's significant departure from this Court's clearly defined test in *Lafayette, Boulder,* and *Town of Hallie* is perplexing. The court below muddied the water by maintaining exactly the opposite position:

> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation (citations omitted), courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. [Opinion below, 37 Cal.3d at 673.]

In designing this "public welfare defense," by which a municipality can engage in, mandate, and authorize conduct, without state authorization, that is anticompetitive in both purpose and effect, the court below created a standard under which the anticompetitive ordinance is deemed not to conflict with the Sherman Act. To withstand Sherman scrutiny, the municipal ordinance need only comport with what is in essence an amalgam of substantive due process and Commerce Clause negative implications tests.

To create this "public welfare defense," the California Supreme Court rejected the traditional *per se* prohibition of price-fixing, because "[i]n our view, maximum rent price-fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants." Opinion below, 37 Cal.3d at 670. In circumventing existing precedent established by this Court in order to force antitrust policy to give way to the local police power autonomy, the California court candidly admitted that it was motivated by a desire to restore anticompetitive autonomy to cities, stating that "if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules." Opinion below, 37 Cal.3d at 664.

The admitted purpose of this test, which fairly conclusively presumes the supremacy of local policy over national antitrust policy, is to prevent "judicial second-guessing of local decisions to accomplish proper local purposes." Opinion below, 37 Cal.3d at 673. The California court articulated its test in the following manner:

> Adapting the court's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation

> has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. [Opinion below, 37 Cal.3d at 675 (footnotes omitted).]

The court stated that it was seeking to establish a test "that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulation." *Id.*, at 674. The court apparently disregarded the serious threat to national policy, alluded to by this Court in *Lafayette* and *Town of Hallie*, if municipalities are "free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects." *Lafayette*, 435 U.S. at 408; *see also Town of Hallie*, 53 L.W. at 4422.

Moreover, the California court explained that this exemption applies not only to "traditional" or "integral" governmental functions, but rather would immunize "all local action rationally related to the promotion of local health, safety, and welfare." Opinion below, 37 Cal.3d at 675, n.27. Although the court borrowed elements of "evenhandedness" and "less intrusive means" from this Court's previous Commerce Clause cases to establish its test, such borrowing was purposefully selective since the court expressly excludes this Court's well-established cost-benefit balancing test:

> We will, however, depart from the United States Supreme Court's commerce clause test is [sic] one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. (See, e.g., *MITE Corp.*, supra, 457 U.S. 624; *Kassel*, supra, 450 U.S. 662; *Clover Leaf Creamery*, supra, 449 U.S. 456; see generally, Eule, *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]; Maltx, *How Much Regulation is too Much—An Examination of Commerce Clause Jurisprudence* (181) 50 Geo.Wash.L.Rev 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same].) [Opinion Below, 37 Cal.3d at 675.]

Significantly, the California court is borrowing tests from the wrong body of law. The line of authority cited above to circumvent the reach of federal antitrust law deals with the "dormant Commerce Clause," also known as the "negative implications" of the Clause, which remain as a limit to state action upon interstate commerce even in the absence of preemptive congressional action. *See* Tribe, *American Constitutional Law*, Section 6-2 (Foundation Press (1978)). This case does not involve a situation in which no express congressional action has been taken and the issue becomes whether the "negative implications" of the Commerce Clause allocation of commerce jurisdiction to Congress implicitly forbid state interference. Rather, this case involves the adjudication of a claim of direct preemption of local action by express congressional action pursuant to the Commerce Clause. The question is simply whether a conflict exists between the two schemes, in which case the congressional policy *must* prevail. Professor Tribe aptly described the difference in congressional action:

> So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action—and the validation of congressionally authorized state or local action—flow directly from the substantive source of the congressional action coupled with the supremacy clause of article VI; such cases may pose complex questions of statutory construction but raise no controversial issues of power. Those issues are raised, however, when state power is said to be ousted not because of specific conflict with what Congress has *done* but because of negative implications thought to flow from what Congress *might* have done. Such ouster of state authority because of "dormant" congressional power of course lies at the heart of most commerce clause litigation.

[Tribe, *supra*, section 6-23; footnote omitted, emphasis in original.]

Clearly, the California court has misapplied the law established by this Court in *Lafayette, Boulder,* and *Town of Hallie.* In this Court's recent decision in *Town of Hallie,* the conflict that existed between the municipal activity and the federal antitrust laws involved an alleged monopoly in sewage treatment services and an alleged tying arrangement between these services and the collection and transportation of sewage. This conflict was sufficient to invoke *Parker* immunity analysis. *See Town of Hallie,* 53 L.W. at 4419. The conflict with federal antitrust law is equally as great in this situation in which a municipality is fixing the rents chargeable by private landowners.

A modified commerce clause-type test to determine whether a municipal ordinance conflicts with the Sherman Act is unjustified and departs with the standard established by this Court. Such a test is not necessary to determine whether a municipal ordinance facially conflicts with federal antitrust law and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In reality, although the test below is couched in terms of substantive "conflict" between federal and municipal law, the California court, by creating this test, has attempted to overrule this Court's opinions in *Lafayette* and *Boulder* and to uphold the argument, expressly rejected in both those cases, that municipal action in pursuit of local social policy enjoys an implied exclusion from the antitrust laws.

Therefore, because the test created by the California Supreme Court significantly departs from the precedent established by this Court, we urge this Court to note probable jurisdiction to decide this case on the merits.

CONCLUSION

The rent control ordinance enacted by the city of Berkeley clearly constitutes price-fixing, an activity that, in all cases, is *per se* invalid under the Sherman Act. Price-fixing undoubtedly conflicts with federal antitrust law and is therefore preempted by Sherman under the Supremacy Clause.

Unlike a sovereign state, the city of Berkeley is not entitled to state action immunity under the *Parker* doctrine because they are not acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with municipal regulation. The city of Berkeley's Measure D, therefore, cannot escape preemption by the Sherman Act.

In this case, moreover, the nexus between the rent control ordinance and interstate commerce is sufficient to invoke federal jurisdiction under the Sherman Act. The impact of this anticompetitive municipal regulation on investors, financing and lending institutions, title insurance companies, brokers, real estate salespersons, contractors, building material suppliers and all other commercial industries related to the rental housing industry is widespread and substantial. California is not the only market affected by this municipal regulation.

Finally, because the test created by the court below departs significantly from earlier precedent established firmly by this Court in *Lafayette, Boulder,* and *Town of Hallie,* it should be overturned by this Court. Due to the foregoing considerations, the California Association of Realtors respectfully urges this Court to grant plenary consideration to this very important case.

Respectfully submitted,

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